IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

Nos. 567 and 568

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

RCA COMMUNICATIONS, INC.,
Respondent.

MACKAY RADIO AND TELEGRAPH COMPANY, INC.,
Petitioner,

v.

RCA COMMUNICATIONS, INC.,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

JOHN T. CAHILL,
Attorney for Respondent,
63 Wall Street,
New York 5, N. Y.

LAWRENCE J. McKAY,
HOWARD R. HAWKINS,
WILLIAM E. HEGARTY,
Of Counsel.

April 22, 1953.

Parkside Press, Inc., 11 Thomas St., New York 6, N. Y. U. S. A.

INDEX.

Table of Authorities.

STATUTES

OTHER AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

Nos. 567 and 568

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

RCA COMMUNICATIONS, INC.,
Respondent.

MACKAY RADIO AND TELEGRAPH COMPANY, INC.,
Petitioner,

v.

RCA COMMUNICATIONS, INC.,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

This case involves the correctness of the reversal by the court below of authorizations by the Commission (two Commissioners dissenting and the Chairman not participating) of duplicative common carrier operations—international radio circuits with The Netherlands and Portugal.

In granting the authorizations here in issue, the Commission majority for the first time in the history of common

carrier regulation substituted for the Congressional standard of the "public interest, convenience, or necessity" a new standard. Under the guise of an admittedly new "guiding policy", the Commission here invented and invoked a substitute standard which it labels the "reasonably feasible".*

In the past, the Commission, consistent with the legislative history of the Congressional standard and its interpretation by the courts and other licensing agencies, has refused to authorize common carrier operations unless it found that the proposed operations would result in reduced rates or improved or more comprehensive service.

In this case, the Commission majority under its new standard, suddenly adopted after 50 years of governmental regulation under the public interest standard, including 17 years by this Commission, authorized duplicative radio circuits to The Netherlands and Portugal *despite specific findings that—*

(a) the capacity of existing facilities is in excess of that required by present and expected traffic;

(b) active and substantial over-all competition exists for traffic with the points in issue;

(c) the proposed duplicative circuits

—will not satisfy a public need or result in lower rates or speedier service or will not otherwise be superior to or more comprehensive than the service now available;

—will not generate new traffic but will divert traffic from existing carriers without reduction of their expenses;

---

* Seventeenth Annual Report, Federal Communications Commission 4 (1951).

—will reduce total revenue of the United States communication system;

—will have an impact (increase) on the rate structure;

—will create the danger of foreign monopolies "playing-off" one United States carrier against the other to the detriment of the United States communication system;

—will degrade existing service;

—will require additional scarce radio frequencies and will use other scarce frequencies.

In addition to this negation of the Congressional standard, the Commission majority here fostered substantial lessening and restraints of competition between cable and radio and sanctioned "tying" agreements in restraint of competition between carriers, both in violation of express provisions of the Communications Act.*

The Commission's findings show that the proposed duplicative radio circuits will result in—

(a) a substantial lessening and illegal restraints of competition between cable and radio culminating in "deliberate diversions" of cable traffic from a cable company to a commonly owned and controlled radio carrier and, to that extent, the non-use of a competing cable company; and

(b) the effectuation of "tying" agreements pursuant to which that radio carrier will siphon off cable traffic from a company commonly controlled with it, convert that traffic into radio traffic and use it to purchase proportionate return radio traffic, thus foreclosing a radio carrier having no cable affiliation from competing for that substantial traffic.

---

* Communications Act of 1934, 48 Stat. 1064 (1934), 47 U. S. C. §151 *et seq.* (1946), as amended (Sections 314 and 313).

The economic extravagance and injury to the public resulting from these proposed duplicative operations is highlighted by the promised application of the Commission's new standard to other common carriers. The Commission's unprecedented premise for common carrier authorization would require the wasteful duplication of the telephone systems of A. T. & T. and the railroad system of the New York Central.

As the court below held in the past and reiterated in its instant decision:

> ". . . the Communications Act does not show 'a congressional belief that two radiotelegraph circuits are necessarily better than one. Such a belief would be as strange as a belief that two telephone systems, or two railroads, are necessarily better than one. . . . [*it*] *forbids competition by all who cannot prove that their entry will serve the "public interest, convenience or necessity"*'" (R. 699-700).*

The Commission's findings make clear that the Congressional mandate has been violated in at least three fundamental respects:

> The Commission majority has made cumulative competition among common carriers an end in itself —which Congress refused to do.
>
> The Commission majority has refused to require competition between cable and radio which Congress has specifically directed that it do.
>
> The Commission majority has sanctioned illegal private restraints upon competition in international communication which Congress forbade it to do.

---

* *Mackay Radio & Telegraph Co., Inc.* v. *Federal Communications Commission*, 68 App. D. C. 336, 338, 97 F. 2d 641, 643 (1938). Emphasis ours throughout.

The court below agreed with the dissenting Commissioners and correctly determined, as a matter of law, that "the Commission's basic findings do not support its determination" (R. 699). The court below held that the Commission majority in authorizing duplicative radio circuits did not act in accordance with its statutory mandate in light of its specific findings that no benefit, but rather harm to the public, will result.

The court below in reversing the Commission noted (R. 700) that neither this Court nor Congress, though Congress was specifically asked to do so, has limited the effect of its long standing decision that an applicant for a radio circuit must show that the public will be benefited thereby.*

Opinions Below

The opinions of the Court of Appeals for the District of Columbia Circuit (R. 696-707) are reported in 201 F. 2d 694 (1952). The opinions of the Federal Communications Commission (R. 550-654) are not yet reported.

Jurisdiction

The jurisdictional requisites are set forth in the briefs of the petitioners.

---

* *Mackay Radio & Telegraph Co., Inc.* v. *Federal Communications Commission*, 68 App. D. C. 336, 97 F. 2d 641 (1938).

Questions Presented

The three questions before this Court are:

(1) Whether the Commission, in authorizing duplicative radio circuits, acted in accordance with its statutory mandate to further the public interest, in view of its findings that:

(a) the capacity of existing facilities is in excess of that required by present and expected traffic;

(b) active and substantial over-all competition exists for traffic with the points in issue;

(c) neither lower rates nor superior service, but rather specific injuries to the public, will result.

(2) Whether the Commission acted in accordance with its statutory mandate to require competition between radio carriers and cable lines as two separate media when it sanctioned, among other restrictive practices, the siphoning off and conversion of substantial traffic from a cable company to its commonly owned and controlled radio company and to that extent the non-use of a competing cable company.

(3) Whether the Commission acted in accordance with its statutory mandate not to license carrier operations which violate the antitrust laws when it authorized a radio carrier to operate under "tying" agreements pursuant to which the radio applicant will milk cable traffic from its commonly controlled cable company and purchase with it radio traffic from foreign government-controlled monopolies, thus foreclosing a radio carrier, having no cable affiliation, from competing for that substantial traffic.

ing that Section 314 is not applicable to them. We, therefore, find . . . that Section 314 is applicable to respondents herein" (Par. 110).*

Although Mackay Radio and Commercial Cable have been commonly owned by AC&R (and its predecessor) for many years, elimination of competition between the two companies here culminating in deliberate diversion of cable traffic to radio by contract is a development of the recent past.

The Commission found in this case:

> "During the last few years there has been an increasing effort toward the consolidation of the operations of the [AC&R] companies" (R. 566).

The common Executive Vice President of AC&R, Commercial Cable and Mackay Radio testified to an accelerated process of integration "within the very recent past" (R. 259).

The Commission has found (Docket 9093):

> (a) Until 1946 both Commercial Cable and Mackay Radio maintained separate staffs for the solicitation of traffic, were actively engaged in seeking traffic, and solicited against each other (Par. 35).
>
> (b) Prior to 1946, Commercial Cable and Mackay Radio maintained separate branch offices (Par. 34).
>
> (c) Since 1946 a joint tariff of rates and conditions of service for the AC&R companies has been

---

* In Docket 9093 the Commission concluded on the facts then before it that AC&R did not violate Section 314. In that proceeding Mackay Radio's operations under the proposed circuits with The Netherlands and Portugal were not in issue. The Commission explicitly recognized the possibility that future AC&R operations might violate Section 314 (Par. 139). The Commission majority here admitted that the decision in Docket 9093 did not foreclose the issue (R. 602).

Statute Involved

The statute involved is the Communications Act of 1934, 48 Stat. 1064 (1934), 47 U. S. C. § 151 *et seq.* (1946), as amended (herein called the "Communications Act"). The pertinent portions of Section 1, 309(a), 313, 314 and 602(d) thereof are set forth in Appendix A hereto.

Statement

The proceedings before the Commission were instituted by an order adopted February 6, 1948 designating for hearing the applications of Mackay Radio and Telegraph Company, Inc. ("Mackay Radio") filed in 1946 for modification of licenses and for special temporary authorizations to operate duplicative radio circuits with certain foreign countries including The Netherlands and Portugal (R. 551, 553).

The Commission, after first denying Mackay Radio's applications for special temporary authorization to operate to The Netherlands and Portugal, issued an order granting the applications for a period of 90 days. Pursuant to this order, Mackay Radio operated duplicative radio circuits to the two countries for a short period. Subsequently the Commission on petition of RCA Communications, Inc. ("RCAC") cancelled and set aside its order and directed Mackay Radio to cease such operations (R. 551-553).

Hearings commenced on April 26, 1948 and concluded on June 22, 1948 (R. 554). On February 23, 1951, the Commission (Commissioners Webster and Sterling dissenting and the Chairman not participating) handed down its decision and order authorizing the duplicative circuits in issue.

The court below reversed (R. 708) that part of the decision and order which granted the applications of

filed, following upon the consolidation of comptroller and tariff departments of the companies (Par. 36).

(d) All administrative, engineering and commercial activities were combined and operated under a unified executive staff by 1946 (Par. 36).

(e) In 1946, the plant departments of the AC&R companies were consolidated (Par. 36).

(f) In 1948, the service department of Mackay Radio was consolidated with the service department of Commercial Cable (Par. 36).

(g) In 1948, a joint cable and radio message blank was adopted and placed in use (Par. 35; R. 529).

Prior to this program of integration, Commercial Cable and Mackay Radio were held out by their representatives as competing companies.

In 1938, the President of Mackay Radio testified before a Congressional committee with respect to competition between Mackay Radio and Commercial Cable:

> "We are in competition with the cables. They are independent companies, of course, all associated under the common head; but we have to compete just like any other radio company."*

Similar statements by representatives of the AC&R companies were made in 1935, 1943 and 1946 in applications to and hearings before the Commission.**

Proposed elimination of cable competition

The competitive situation with respect to The Netherlands and Portugal prior to the authorizations in issue was described by the Commission as follows:

---

* Hearings on H.R. 10348, 75th Cong. 3d Sess. 14; 15 (1938); read into the record at transcript pages 1850, 1851.

** Docket 9093, Pars. 104, 106, 107.

Mackay Radio to operate duplicative radio circuits, direct and by relay via Tangier between the United States and The Netherlands and direct between the United States and Portugal (R. 630-632).*

The court below accepted the Commission's basic findings but reversed its decision and held as a matter of law that these findings did not support the determination that the duplicative circuits here authorized would serve the public interest, convenience, or necessity (R. 699). The facts hereinafter set forth, with appropriate record references, represent either findings made by the Commission or undisputed statements in the record.**

Development of the International Radio Communication Industry

Prior to the organization of Radio Corporation of America ("RCA"), RCAC's parent, in 1919, at the request of the United States Government, international radio communication was in the hands of foreign companies (R. 559-560). RCA was organized for the purpose of forming an American-controlled corporation to develop international radio communication (R. 558, 560).

In 1920, RCA began operating point-to-point stations which were turned over to it by the United States Navy Department (R. 560). Subsequently these operations were turned over to RCAC (R. 558).

In 1927, Congress enacted an earlier radio act (44 Stat. 1162) and created the earlier Federal Radio Commission. That earlier act was concerned with the allocation of radio frequencies so as to bring order out of chaos.*** Unlike

* The Commission denied the application of Mackay Radio for a direct circuit between the United States and Surinam (R. 630-632). This portion of the Commission's decision was not brought up for review.

** Statements in the present tense refer to the time of the hearing.

*** *Hoover v. Intercity Radio, Inc.*, 286 Fed. 1003 (D. C. Cir.

> "The record shows that there is at present active competition . . . not only between cable carriers, and between cable and radiotelegraph carriers serving the points at issue . . . but also between such telegraph service provided by these carriers and the airmail and radiotelephone services" (R. 606).

The Commission elsewhere described the existing situation as one of "substantial over-all competition between telegraph carriers for traffic to and from each of the points at issue herein, as well as competition between cable carriers and radiotelegraph carriers . . ." (R. 612).

The Commission pointed out that in the case of Portugal, "there is also competition between radiotelegraph carriers, i.e., Mackay and RCAC" (R. 606 n. 2).

In this competition, Commercial Cable has played a substantial part. In 1947, Commercial Cable carried 30.9% of the traffic transmitted by cable to The Netherlands and 15.2% of the traffic transmitted by cable to Portugal (R. 612). Commercial Cable and Western Union, the other cable carrier, together carried 70.1% and 42.8% of the total traffic to those countries, respectively, in that year (R. 612).

The contract between Mackay Radio and The Netherlands Administration of Posts, Telephones and Telegraph, under which Mackay Radio will operate its circuits to The Netherlands, provides:

> "Mackay will transmit all its traffic destined to Holland and all traffic of The Commercial Cable Company destined to points in Holland excluding Rotterdam not otherwise routed and guarantee that the volume of traffic transmitted over any 12 months' period shall not be less than 50% of the total volume of traffic within control of Mackay and Commercial Cable destined to all Holland including Rotterdam.

its successor, the Communications Act, the 1927 radio act did not provide for the regulation of international radio communication as a common carrier activity. Under that act, Mackay Radio was authorized to operate 18 international radio circuits (R. 561).

In 1934, Congress repealed the 1927 act and substituted the Communications Act. In doing so, Congress adopted many of the provisions of the Interstate Commerce Act and provided for the regulation of international radio communication by this Commission as a common carrier activity (Sen. Rep. No. 781, 73d Cong. 2d Sess. 2 (1934)).

From the organization of the Commission in 1934, to the opening of World War II in 1939, applications filed for duplicative radio circuits were denied by the Commission (R. 561).

From the beginning of World War II and the interruption of most European cable service,* several applications for special temporary authority to operate parallel circuits were granted (R. 561).** This wartime measure was confirmed by the Defense Communications Board (later succeeded by the Board of War Communications) in January, 1942 (R. 27-28, 561).***

Under this wartime measure "Mackay Radio was granted special temporary authorizations without hear-

---

* Sixth Annual Report, Federal Communications Commission 41 (1940); Seventh Annual Report, Federal Communications Commission 1 (1941).

** Unlike duplicate circuits which are to the same point in a foreign country, parallel circuits where practical are operated to separate points. Thus, from a national defense viewpoint if one point of communication is seized by enemy action, the other point of communication is still available. In this case both radio carriers' European terminals *are in the identical cities in Portugal and The Netherlands.*

*** The Chief of the Commission's Common Carrier Division (Engineering Department) testified that the policy of the Defense Communications Board "was setting forth what was actually the way the Commission was acting . . ." (R. 39).

"[The Netherlands] administration will transmit all traffic routed via Mackay by the sender and a portion of its unrouted traffic destined to United States and beyond which will bear to [the administration's] total volume of traffic to or through United States the same ratio which the volume received from Mackay bears to the total volume received from all radio companies in the United States" (R. 501, 502).

AC&R will advise customers in the United States to route traffic to points within The Netherlands, other than Rotterdam, via Mackay Radio's circuit to avoid having the guarantee invoked against it. If, however, customers persist in preferring Commercial Cable and if the diversion of unrouted traffic* from Commercial Cable is not sufficient, "it would be necessary to divert some traffic routed via Commercial to Mackay, or to make other arrangements to compensate The Netherlands Administration financially" (R. 573).

The contract between Mackay Radio and Companía Portuguesa Radio Marconi (a company controlled by the Portuguese Government (R. 292)) under which Mackay Radio will operate its circuit to Portugal provides:

"... Mackay will transmit over the direct circuit all of the AC&R system's unrouted traffic to Portugal together with such traffic as may be specifically routed via Mackay. In the westbound direction Portuguese Marconi will transmit to Mackay a proportion of the westbound traffic available to Portuguese Marconi equal to Mackay's proportion of the

---

*Unless the sender writes in a specific routing, as "Via Commercial Cable", on the combined AC&R radio and cable message blank it is now considered by the AC&R companies to be unrouted (Docket 9093, Par. 35; R. 267-268).

ings" resulting in the establishment of circuits with 12 countries (R. 562). Some of these were duplicate circuits granted where parallel circuits were impossible (R. 561).

In 1943 this wartime policy was abandoned and between 1943 and 1945 applications for duplicative radio circuits were denied (R. 561-562).

In 1946 Mackay Radio filed its application for the duplicative radio circuits here involved (R. 551). *This case is the first time a hearing has been held on any such application since the end of World War II* (R. 618).

All existing licenses for duplicative radio circuits, other than those here involved, are subject to Commission review under the proceedings pending in Docket No. 7974, *In the Matter of Radiotelegraph Service between the United States and Foreign and Overseas Points.*

The Common Carriers Involved

Mackay Radio is a common carrier by radio of international messages (R. 556). It is a wholly-owned subsidiary of the American Cable and Radio Corporation ("AC&R") (R. 555).

The Commercial Cable Company ("Commercial Cable") is a common carrier by cable of messages between the United States and foreign countries, including The Netherlands and Portugal (R. 556, 569, 582-583). It is also a wholly-owned subsidiary of AC&R (R. 555).

During the last few years there has been an increasing effort toward consolidation of the operations of Mackay Radio and Commercial Cable through the control of management, operations and policies exercised by their common parent, AC&R (R. 566). This is an attempt *de facto* to merge international cable and radio systems, unique in the international communications industry, and to eliminate

competition for traffic and in the rendering of service between these two operating companies (R. 566, 609).*

Mackay Radio and Commercial Cable through AC&R form a part of the world-wide communications and manufacturing complex of the International Telephone and Telegraph Corporation ("IT&T") (R. 555-557)—self-advertised as the "largest American system of international communications" (R. 248).**

RCAC is a wholly-owned subsidiary of Radio Corporation of America and operates radio circuits between the United States and many points throughout the world (R. 558, 560).

The Western Union Telegraph Company ("Western Union") operates a nation-wide land wire system in the United States and, in addition, a system of submarine cable connecting North America with Europe and Latin America over which direct and indirect cable service is provided with points throughout the world, including The Netherlands and Portugal (R. 559, 568-569, 581-582).***

The Existing Service

Common carrier service with The Netherlands and Portugal is provided by the cable facilities of Commercial Cable and Western Union, by the direct radio circuits of

---

* As the Commission has pointed out:

"'. . . Congress has not approved any . . . proposals . . . looking toward a merger of international telegraph companies'" (R. 624).

** IT&T has control through stock ownership of a number of domestic and foreign companies whose activities include the operation, construction and management of internal and international communication systems by wire, radio and telephone. The communications activities of IT&T are carried on through AC&R and its subsidiaries and through a number of foreign subsidiaries (R. 555-557).

*** Western Union, as well as RCAC, opposed a grant of the applications of Mackay Radio (R. 554-555).

RCAC and, in the case of Portugal, by an indirect radio circuit of Mackay Radio (R. 604).

In addition, there is available to the public the increasingly competitive trans-atlantic telephone services of A. T. & T. and the airmail (R. 570, 583).

International telephone conversations have increased 900% since 1937.* Gross weight of air mails to The Netherlands and Portugal during the last five months covered by the record show that 35,429 pounds and 17,831 pounds, respectively, were dispatched from the United States.**

The following table reflects the communication service between the United States and the points involved prior to the authorizations here in issue.

Between the United States and The Netherlands

Type of Service	Companies Rendering Service
Cable Lines	Eight submarine cables maintained by Western Union and six cables maintained by Commercial Cable (R. 568-569). In addition, Western Union has four alternative routes for handling cable traffic between the two points (R. 568-569).
Direct Radio Circuits	RCAC maintains five channels of communication in each direction (R. 569-570). RCAC's circuits are available on a 24 hour basis and the capacity is 10,800 words per hour in each direction (R. 516-517).
Telephone	Transatlantic telephone services maintained by A.T.&T. (R. 570).

* Exh. 176 (Tr. 2983, appears at Tr. 3834).

** Exh. 177 (Tr. 2983, appears at Tr. 3838).

Type of Service	Companies Rendering Service
Air Mail	By transatlantic air carriers (R. 570).

Between the United States and Portugal

Type of Service	Companies Rendering Service
Cable Lines	Four submarine cables maintained by Western Union and Commercial Cable (R. 581-582). Messages may also be handled by Western Union and Commercial Cable over an alternative route via any one of their main cables (R. 582-583).
Direct Radio Circuits	RCAC maintains a direct radio circuit. This circuit is open on a 24 hour basis and the capacity is 2700 words per hour in each direction (R. 516-517, 583).
Indirect Radio Circuit	Mackay Radio maintains an indirect radio circuit (R. 583)
Telephone	Transatlantic telephone services maintained by A. T. & T. (R. 583).
Air Mail	By transatlantic air carriers (R. 583).

Over-capacity of Existing Service

The Commission found:

> "It is clear . . . and it is admitted by all the parties hereto, that the capacity of existing telegraph communications facilities between the United States . . . and The Netherlands [and] Portugal . . . is in excess of that required to handle the present and expected volume of telegraph traffic under normal operating conditions" (R. 604).

Even during peak periods, and for the predictable future, RCAC's facilities alone are more than adequate to meet the entire public requirement for communications service with The Netherlands and Portugal (R. 132). *In fact, RCAC's average excess capacity to and from these points is 90% and 78%, respectively* (R. 131-132, 516-517, 604).

The common Vice President of Mackay Radio and Commercial Cable in charge of sales development activities testified that he could recall no requests from customers for a Mackay Radio circuit to either The Netherlands or Portugal (R. 311).

"Active" and "Substantial" Competition Already Exists

The Commission found that there is "active" and "substantial" over-all competition for traffic to and from The Netherlands and Portugal. This competition exists between the radio carrier and the cable carriers and between their services and the radio-telephone and airmail services (R. 606, 612). The cable carriers together carried 70.1% and 42.8% of the total traffic to these countries, respectively, in 1947 (R. 612).

The Proposed Duplicative Circuits

The Commission, after determining that existing facilities are in excess of those required to handle present and expected traffic (R. 604) and that there is active and substantial competition for communications traffic among the existing carriers and facilities (R. 606, 612), considered what concrete advantages to the public might result from the proposed service and found:

> **"It does not appear that Mackay's proposed service to each of the points at issue will result in lower rates or speedier service, or will otherwise be superior to or more comprehensive than the service now available via RCAC" (R. 605).***

The Commission majority refused to pass on RCAC's contention that the proposed service would be inferior to the service presently available (R. 576-577, 588). It further refused to consider RCAC's contention that Mackay Radio's program for the application of improved methods is far behind that of RCAC (R. 605). It contented itself with the finding that Mackay Radio is "qualified" to provide service to the points at issue (R. 605).

Injuries to the public

In addition to the foregoing findings that the cumulative competition of the duplicative circuits will fill no public need and produce no public benefit, the Commission made findings that injuries to the public will result.

(a) Diversion of traffic from existing carriers

The Commission found that the proposed operations cannot reasonably be expected to generate new telegraph traffic in any substantial degree (R. 606).

---

* This basic finding the court below held to be broad enough to contradict any argument that any long range benefits might result (R. 701).

The Commission also found that the service proposed by Mackay Radio between New York and The Netherlands would not be superior to that rendered by Western Union (R. 576). Mackay Radio's service will not be superior to that of its sister Commercial Cable to The Netherlands when an automatic relay at London is reestablished by Commercial Cable (R. 576). An opportunity was afforded Commercial Cable to open a direct cable service to Portugal in 1946 when Mackay Radio's applications were filed (R. 307-308).

They will result rather in a redistribution of existing traffic volumes among the many carriers serving The Netherlands and Portugal (R. 606). Traffic and revenues would be divided with a new carrier.

The traffic and revenues which would otherwise accrue to the existing carriers providing adequate service will be reduced without substantial reduction in their expenses (R. 607). The Commission was unable to determine the exact extent of the reduction in the revenues of the existing carriers (R. 580, 594).*

The expenses of Mackay Radio will be increased (R. 578, 592).

(b) Reduction in revenue of United States communications industry

Apart from the normal economic results of introducing a new carrier without any generation of new traffic, the Commission found that the peculiar contractual arrangements under which the Mackay Radio circuits would be operated would cause a reduction in revenue to the United States communications industry.

Mackay Radio has contracted with The Netherlands and Portuguese radio administrations to divert substantial

---

* The theory of the Commission majority was that, since the volume of traffic with The Netherlands and Portugal handled by RCAC would be reduced, the amount of its expenses allocated to those circuits would be correspondingly reduced (R. 579 n. 1, 594 n. 2). As a matter of fact RCAC's over-all expenses would remain unchanged while its over-all revenues would be reduced, and in effect its operations with The Netherlands and Portugal would be subsidized by its operations elsewhere.

Under the theory of the Commission majority, RCAC's annual net operating revenues, upon its own estimates of traffic losses, would be reduced 93% in the case of Portugal and 50% in the case of The Netherlands to marginal revenues of $1,040 and $20,326, respectively (R. 594 n. 2, 579 n. 1). The Commission majority found these estimates "questionable", but refused to make a finding as to the amount of the reduced revenues.

amounts of cable traffic from its sister Commercial Cable and to deliver this traffic in the form of radio traffic (R. 573, 591). Since the United States carriers retain a lesser proportion of the tolls from radio traffic than from cable traffic the net effect is a reduction in revenue to the United States communication industry to the gain of the foreign radio monopolies (R. 578 n. 1, 591).

(c) Impact on the rate structure

The Commission majority found that as a result of these facts there would be an "impact" on the rate structure as a whole (R. 607). This can only mean an "increase" in rates (R. 645).*

(d) Danger that foreign monopolies will "play-off" one United States carrier against the other

It was brought out at a Congressional hearing on legislation which would have required the Commission to "consider competition in such communication [direct radio circuits] to be in the public interest"** that the Commission had reported to Congress as follows:

> "Competition has its worst effects in the field of foreign communications. Communications in most foreign countries are handled as a monopoly. Where the monopoly has two competing American companies offering to establish circuits, it can drive progressively harder bargains to the detriment of American interests."***

The proposed legislation was not enacted.

---

* Although the Commission majority concluded that the effect on an industry-wide basis "should not be substantial" (R. 607), rates are determined on the basis of specific areas. Brief of the Commission in the court below, p. 27.

** Hearings on S. 3875, 75th Cong. 3d Sess. (1938).

*** *Id.* at 34.

In the instant case the Commission again recognized the possibility that the government-owned radio communication monopolies, as in the past, would drive progressively harder bargains by playing one American carrier against the other to the advantage of the foreign correspondents and that this would be detrimental to the American communications system and the public which use its facilities. (R. 622).*

(e) Waste of radio frequencies

There is no dispute that radio frequency space is limited and precious. In its Annual Report for the year during which the authorizations in issue were made, the Commission said:

> "The increased crowding of the spectrum has made it extremely difficult to obtain additional frequency assignments for commercial companies operating in the international fixed public service." Seventeenth Annual Report, Federal Communications commission 59 (1951).**

The Commission found:

> "In respect of Mackay's proposed circuit via Tangier, frequencies not now authorized to Mackay must be made available for the transmission from

---

* Although the Commission majority referred to its supervisory powers over the activities of carriers as a protection against this danger (R. 622-623), the contracts between Mackay Radio and the foreign administrations providing for the diversion of cable traffic and the consequent reduction in United States carriers' revenue, here approved by the Commission majority, constitute a striking example of the danger.

** The dissenting Commissioners pointed out that "the overall scarcity of available radio frequencies, due to sharing spectrum space with other countries" is a limiting factor upon competition peculiar to this industry (R. 640).

Tangier to Amsterdam. The record indicates that there is a shortage of frequencies available for assignment at Tangier for communication to European countries" (R. 576)*

The Commission further found with respect to Mackay Radio's direct circuit to The Netherlands that:

> ". . . Mackay may find it necessary to seek an additional frequency or frequencies in order to provide continuous service throughout the eleven year sunspot cycle" (R. 576).

Apart from these additional frequencies, the duplicative circuits will require at least four other frequencies already assigned to Mackay Radio (R. 575-576, 585-586). These frequencies might, of course, be used by Mackay Radio or any other carrier for *needed* services.**

(f) Degradation of existing service

A forked circuit is generally a less efficient method of transmission, as the Commission has previously recognized.*** In such a case when traffic is being transmitted to one of the points on the forked circuit, no traffic can be handled to the other points on the circuit at the same time. The Commission recognizing that Mackay Radio's circuit with Portugal would be a forked circuit (R. 588-589) found:

> "With respect to traffic outbound from the United States, it appears that if Portuguese Marconi were

---

* Final approval by the State Department of the use of these additional frequencies depends upon the Commission's decision here (R. 576).

** In the International Telecommunication Convention (Atlantic City, 1947), the United States and other nations recognize by treaty that "it is desirable to limit the number of frequencies and the spectrum space used to the minimum essential to provide in a satisfactory manner the necessary services." (Article 42.)

*** *Mackay Radio & Telegraph Co., Inc.*, 8 F. C. C. 11, 15 (1940).

to assign only one operator to man the two receiving positions (i.e., the one over which Mackay's messages and the one over which RCAC messages are received from the United States), there is some possibility that the handling of the outbound messages of one of the two carriers might be delayed while the operator was transcribing the messages which were being transmitted simultaneously by the other carrier. The record does not contain sufficient evidence to indicate the nature and extent of the delays which might result from such operation" (R. 589).

Substantial Lessening of Competition Between Cable and Radio

Section 314 of the Communications Act prohibits both control of cable operations by radio and control of radio operations by cable "if . . . the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in . . . the United States . . . and any place in any foreign country . . . or unlawfully to create monopoly in any line of commerce . . ."

Its purpose is to preserve competition between cable lines on the one hand and radio circuits on the other as two separate media of competition. The court below so construed Section 314 both in this case (R. 702) and fifteen years ago in *Mackay Radio & Telegraph Co., Inc.* v. *Federal Communications Commission*, 68 App. D. C. 336, 340, 97 F. 2d 641, 645 (1938).

Common control of Commercial Cable and Mackay Radio

Commercial Cable and Mackay Radio are wholly-owned subsidiaries of and are commonly-controlled by AC&R (R. 555, 566, 609). As the Commission majority itself recognized, AC&R ". . . is concerned with the system as a whole rather than with the individual companies comprising the system" (R. 566).

Applicability of Section 314 to Mackay Radio and AC&R system

The Commission found:

> "... Section 314 is applicable to Mackay and to the AC&R System of which it is a part just as it would be to any commonly owned cable and radio system" (R. 610).

In so finding, the Commission adopted its findings and conclusions in *American Cable and Radio Corp.*, F. C. C. Docket No. 9093 (May 11, 1950) ("Docket 9093") (R. 608-609). There the Commission found that the operations of the AC&R companies:

> "... are at present considerably different from what they were when Section 314 was passed, in that certain elements of competitive activity which previously obtained, particularly with respect to traffic handling, routing and solicitation are no longer followed" (Par. 109).

The Commission there concluded:

> "It is clear that Section 314 does not contain any provision which either expressly or impliedly exempts the respondents herein [the AC&R companies] from the terms thereof. We cannot agree ... that the action of the Federal Radio Commission in granting licenses to Mackay in 1928 ... should be construed that Section 314 could not (sic) in the future apply to the operations of the respondents. Nor can we accept the argument that the action of Congress in reenacting Section 17 of the Radio Act [of 1927] as Section 314, in the light of the evidence discussed above, implied an intent to exclude respondents from the operation of the provisions involved. Finally, we cannot find that any previous action of the Commission with respect to respondents justifies a find-

> total traffic transmitted eastward to Portuguese Marconi from the United States" (R. 591).*

The Commission found that, as a result of these contractual arrangements, traffic would be deliberately diverted from Commercial Cable to Mackay Radio (R. 615). It characterized the result as:

> ". . . the non-use of a competing cable company in the telegraph field" (R. 577).

The Commission estimated the extent of the diversions from Commercial Cable as 50% in the case of The Netherlands and 25% in the case of Portugal (R. 613-614).**

The consequent substantial lessening of competition between cable and radio

The Commission found:

> "There is no doubt that if Mackay's application herein were to be granted a substantial portion of the traffic now handled by Commercial to Portugal

---

* The dissenting Commissioners pointed out that, although the Portuguese contract does not contain a guarantee which might compel the diversion of traffic specifically routed via Commercial Cable, "there is strong evidence in the record that Mackay will siphon off at the source" such traffic (R. 643). They noted that Mackay's traffic manager had testified that AC&R's solicitors were instructed to persuade customers to change their routings in a similar situation involving Spain (R. 644). Such a practice would be to Mackay Radio's benefit since under the contract it would increase the non-competitive allocations to it of traffic to the United States.

** These are minimal estimates based upon present volumes of unrouted traffic. Under the contracts it is to Mackay Radio's advantage to increase the diversions so as to increase the allocation to it of United States-bound traffic, and it has been the practice of the joint solicitation staff of the AC&R companies to urge customers to route their messages via Mackay Radio rather than via Commercial Cable (R. 643-644, 269).

and The Netherlands . . . would be diverted to Mackay.

. . . . . .

"There is no doubt that to the extent that a grant of Mackay's application would result in the deliberate diversion of traffic from the AC&R cable companies, it would reduce competition between cable and radio to the points at issue" (R. 609-610, 615).

Restraints upon competition between cable and radio

The deliberate diversions of traffic from Commercial Cable to Mackay Radio and the consequent substantial lessening of competition between cable and radio to The Netherlands and Portugal both constitute and are accompanied by restraints upon competition.

Commercial Cable will be restrained from competing for traffic to the two countries. In particular, The Netherlands is geographically divided by AC&R between the two companies; one city in The Netherlands (Rotterdam) is given to Commercial Cable, and the rest of the country to Mackay Radio (R. 573, 577).

Traffic which would otherwise be obtained and handled by Commercial Cable acting as an independent carrier will be pooled and allocated between it and Mackay Radio (R. 573, 591).

The customers' choice between alternative and equally important communications media is subject to suppression by reason of the guarantee contained in the contract between Mackay Radio and The Netherlands Administration. In order to satisfy that commitment AC&R may be compelled to transmit messages via Mackay Radio although the senders have chosen to route the messages via Commercial Cable (R. 573).

A joint tariff of rates and conditions of service, rather than separate and competitive tariffs, will be filed (R. 272).

Decisions admittedly will be made not in terms of what will benefit Commercial Cable as an independent cable carrier or Mackay Radio as an independent radio carrier, but in terms of what is considered to be "in the best interests of the [AC&R] system as a whole" (R. 174-175, 207, 566).

Restraint of Competition Between Radio Carriers

The integration of Commercial Cable and Mackay Radio and the diversions of substantial traffic from cable to radio is not without a purpose. That purpose is to obtain non-competitive allocations of traffic to the United States from the foreign correspondents through the purchase of inbound radio traffic with the cable traffic of Mackay Radio's sister company (R. 573, 591).

The common Executive Vice President of AC&R, Commercial Cable and Mackay Radio testified that traffic outbound from the United States is to be divided between the companies with the purpose of obtaining inbound traffic. The extent to which that purpose is determinative varies with the situation in particular countries (R. 267).

The Commission majority quoted testimony of the common Comptroller of the AC&R companies as follows:

> "We are operating an integrated cable and radio system. We are three companies in a group, one company helping the other" (R. 566).

The contractual arrangements between Mackay Radio and the government controlled radio administrations in The Netherlands and Portugal set forth above (*supra* pp. 24-26) provide that Mackay Radio will receive United States-bound traffic in proportion to the radio traffic delivered by Mackay Radio (R. 573, 591). In substantial part, the radio traffic

to The Netherlands and Portugal would comprise converted cable traffic artificially diverted by AC&R from Commercial Cable (R. 577-578, 596).

The foreign administrations are willing to make this guarantee since they retain a greater portion of the tolls on radio traffic than on cable traffic (R. 606).* Absent deliberate diversions of Commercial Cable's traffic to radio, they would not receive this additional revenue.

The arrangement is profitable to the AC&R system. Revenues from outbound traffic will be substantially lessened since as radio traffic the revenues will be shared with the foreign administrations. This loss, however, will be more than compensated for by the additional inbound traffic obtained by Mackay Radio under the contracts. (R. 578, 579, 591).

The non-competitive allocations of United States-bound traffic which Mackay Radio will receive, largely as the result of these deliberate diversions of traffic from Commercial Cable, will be at the expense of RCAC (R. 580 n.1, 592).

RCAC, which renders service solely by radio and has no affiliation with any cable carrier (R. 558), will be immediately foreclosed from competition for a substantial share of traffic from The Netherlands and Portugal.

In the words of the Commission majority:

> "The record shows that this contractual arrangement between Mackay and The Netherlands Administration obligating The Netherlands Administration to transmit to Mackay a proportion of its westbound traffic equal to Mackay's proportion of total east-

* The Commission found:

> "The Netherlands Administration has no proprietary interest in the operation of United States cable carriers and it received relatively little financial return from traffic handled by such cable carriers" (R. 580).

bound radio traffic sent to The Netherlands by all radio carriers in the United States would operate to give Mackay an advantage over RCAC, in securing inbound traffic from The Netherlands because the amount of return traffic which Mackay will receive will depend to a large extent upon the amount of cable traffic diverted from Commercial to Mackay . . . . (R. 577-578).

* * * * *

"To the extent that Portuguese Marconi will turn over to Mackay a proportion of Marconi's westbound radio traffic equal to Mackay's proportion of eastbound traffic sent to Portugal by all radio carriers in the United States, Mackay will enjoy an advantage over RCAC. This is so because the amount of westbound traffic which Mackay receives will depend to some extent on the amount of eastbound cable traffic diverted from Commercial Cable to Mackay" (R. 596).

The Decision of the Court of Appeals.

The Court of Appeals (one judge dissenting) held that the decision of the Commission majority was invalid as a matter of law.

The court below stated:

"It may follow that, as the Commission thought, the proposed competition is reasonably feasible. But that is not the question. The Communications Act authorizes the Commission to grant licenses only if it 'shall determine that public interest, convenience, or necessity would be served by the granting thereof * * *' 47 U. S. C. §309. The Commission did so determine here. But we agree with the dissenting Commissioners that the Commission's basic findings do not support this determination" (R. 698-699).

The court below rejected the Commission's newly invented standard:

> "The Commission said: 'Competition can generally be expected to provide a powerful incentive for the rendition of better service at lower cost. * * * The benefits to be derived from competition should, therefore, not be lightly discarded.' This argument in favor of the Commission's general theory is not a finding that the specific competition here in issue will produce better service or lower rates or any other public benefit. *Any implication that benefit will result is contradicted by the Commission's finding (3) above.** *The Commission's brief on this appeal speaks in general terms of 'long range' benefits of competition. But in deciding this case the Commission made no finding that long range benefits would result from its grant to Mackay, and nothing in its basic findings would have supported such a conclusion. Its unqualified finding (3) is broad enough to contradict such a conclusion."* (R. 698-699, 701)

The court below noted that the Commission majority admitted that the same question was here presented as had been presented in the *Oslo* case (*Mackay Radio & Telegraph Company, Inc.*, 2 F. C. C. 592 (1936)) and that there the court below had affirmed the Commission's denial of Mackay Radio's application (*Mackay Radio & Telegraph Co., Inc.* v. *Federal Communications Commission*, 68 App. D. C. 336, 97 F. 2d 641 (1938)) (R. 699).

The court below further pointed out that Mackay Radio did not seek a review of that decision in this Court but

---

* The Commission's finding to which the court below referred as finding 3 reads as follows: "It does not appear that Mackay's proposed service to each of the points at issue will result in lower rates or speedier service, or will otherwise be superior to or more comprehensive than the service now available via RCAC" (R. 605).

instead unsuccessfuly appealed to Congress to change the national communications policy embodied in the public interest standard. The court below stated:

> "Neither Congress nor the Supreme Court has limited the effect of the Oslo case, though Congress was promptly asked to do so. We decided the case April 11, 1938. Beginning May 2, 1938, a subcommittee of the Senate Committee on Interstate Commerce held hearings, in which the Oslo decision was discussed, on a bill, S. 3875, that proposed to amend §313 of the Communications Act by adding: '"It is hereby declared to be the intention and policy of the Congress to prevent monopoly and to encourage competition in direct foreign radio telegraph communication; and, for the purposes of this act, in considering applications for licenses to engage in direct foreign radio telegraph communications, or applications for modifications or renewals of such licenses, the Federal Communications Commission shall consider competition in such communication to be in the public interest"'. It was brought out at the hearing that the Commission had reported to Congress on February 5, 1935: *'Competition has its worst effects in the field of foreign communication. Communications in most foreign countries are handled as a monopoly. Where the monopoly has two competing American companies offering to establish circuits, it can drive progressively harder bargains to the detriment of American interests.' S. 3875 was not enacted.*"

The court below also considered whether the decision of the Commission majority sanctioned illegal restrictions upon competition between cable and radio and between radio carriers—contentions at all times urged by RCAC (R. 607-608). The court doubted that the record supported the conclusion of the Commission majority that over-all

competition would be enhanced by the proposed circuits (R. 698). The court deliberately construed Section 314. It said:

> "Section 314 of the Communications Act is devoted, as we said in the *Oslo* case, 'wholly to an effort to maintain competition between radio circuits on the one hand and telegraph and cable lines on the other' " (R. 702).

Summary of Argument.

The statutory standard of the "'public interest, convenience, or necessity" is the touchstone for the exercise of the Commission's authority. In applying it, the Commission is required to give effect to all elements of the public interest—the national communications policy and the express provisions of the Communications Act. The instant decision of the Commission majority directly violated three essential elements.

I.

The requirement that common carriers be licensed is intended to secure concrete advantages to the public in the form of service and rates and to prevent waste of the limited radio frequency space and economic extravagance which result from unnecessary duplication. The courts and the Commission have heretofore recognized these Congressional purposes.

The Commission majority in this case authorized duplicative common carrier operations—international radio circuits. The authorizations of the Commission majority were based solely upon the determination that still further competition in and of itself is the end to be achieved. It did

so although it found that there is no public need for additional service; that there is active competition for communications traffic; and that no benefits, rather harm, to the public will result.

The Commission majority adopted and applied a novel licensing standard which violates the statutory standard. Its ultimate determination was contradicted, rather than supported, by its basic findings.

II.

Section 314 of the Communications Act expressly prohibits the control of cable operations by radio and the control of radio operations by cable "if . . . the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in . . . United States . . . and any place in any foreign country . . ."

This Section expresses the Congressional recognition that common ownership of cable and radio is dangerous to the "wire and radio" services which it sought to preserve as separate media. To set the permissible limits of common ownership of these competing media, Congress borrowed the familiar terms of the Sherman and Clayton Acts.*

The Commission here found that the radio applicant was commonly owned together with a cable carrier and that previous competition between them had in recent years been impaired. It further found that the radio applicant would operate the circuits in issue under contracts providing for deliberate diversions of substantial traffic to itself

* 26 Stat. 209 (1890), 15 U. S. C. §§1-7 (1946), as amended; 38 Stat. 730 (1914), 15 U. S. C. §12-27 (1946), as amended.

from its cable carrier twin and that competition between cable and radio would thereby be substantially reduced.

The conclusion of the Commission majority disregards the explicit requirement of the Communications Act that competition between cable and radio be maintained and sanctions a substantial lessening and illegal restraint of competition between the two media.

III.

Congress, in order to prevent private anti-competitive practices of carriers which might frustrate their regulation in the public interest, made all applicants and licensees amenable to the antitrust law (Section 313). This section seeks to insure that competition will not be restrained between licensed carriers.

The Commission majority in granting the authorizations here involved disregarded the substantial reduction of competition between cable and radio which it found would result. It moreover disregarded the illegal "tying" agreements under which the proposed circuits would be operated. Under these "tying" agreements, as the Commission found, the radio carrier will siphon off the traffic of a cable carrier commonly controlled with it, convert it into radio traffic and trade it for proportionate return radio traffic, thus using the leverage of its cable ownership to foreclose a radio carrier having no cable affiliation, from competing for that substantial traffic.

ARGUMENT.

I.

The Commission Authorized Duplicative Common Carrier Operations to the Public Detriment in Violation of the Statutory Licensing Standard

The Congressional Licensing Standard Requires Findings of Public Need or Specific Public Benefit

Section 309 of the Communications Act prohibits the authorization of radio circuits unless the Commission finds that the "public interest, convenience or necessity" will be served thereby.

This Congressional standard is given meaning by the declaration of the national communications policy in Section 1 of the Act—a policy directed toward achieving the practical benefits to be expected of common carrier communications service. Cf. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24. A "rapid, efficient . . . world-wide wire and radio communication service with adequate facilities at reasonable charges" is to be made available to "all the people of the United States."

In order to secure these concrete public advantages, Congress provided in Title II of the Act for the detailed regulation of radio carriers as common carriers. It adopted a regulatory scheme, which, as in the case of railroads, "involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted." *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474.*

---

* At the same time, in Sections 313 and 314 Congress sought to insure both that regulation of carriers would not be frustrated by their private anticompetitive practices and that competition between *types* of carriers (cable and radio) would be maintained.

Congress was compelled to make this choice not only by the economic waste of unnecessary duplication, but also by the unique nature of this industry.* A duplicative radio circuit causes the wasteful use of scarce radio frequencies, more important by far than the economic losses involved.

> "The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest." *National Broadcasting Co.* v. *United States*, 319 U. S. 190 at 216.

The statutory standard for the licensing of radio carriers thus has practical ends in view. It is one having ascertainable criteria and is to be interpreted by its context, the nature, scope, character and quality of the services involved. Essentially it requires that the new operations will either:

(1) fill an unsatisfied public need; or

(2) result in specific benefits to the public in the form of improved service or lower rates.

In *Hudson Transit Lines, Inc.* v. *United States*, 82 F. Supp. 153 (S. D. N. Y. 1948) aff'd 338 U. S. 802, the Interstate Commerce Commission had granted a certificate of public convenience and necessity to a common carrier for the operation of a bus route in competition with an existing

---

* Representative Rayburn stated with respect to Section 214 of the Communications Act, which contains a requirement that the public interest be served by any extension of a communications line similar to that of Section 309 governing radio circuits, that it was intended:

> "... to prevent useless duplication of facilities, with consequent higher charges upon users of the service" 78 Cong. Rec. 10314 (1934).

carrier. The three-judge District Court reversed the Commission's order since it was "not based on any finding that existing service is inadequate, or that the newly authorized operation will secure to the pubic improved service . . ." (82 F. Supp. at 158). Circuit Judge Swan speaking for the Court said:

> "The Commission has frequently held that under §207 of the Act, 49 U. S. C. A. §307, there must be an affirmative showing not only that a common carrier service is required in the convenience of the public but also that it is a necessity, and that the latter element includes a showing that present facilities are inadequate. Pan-American Bus Lines, Operation, 1 M. C. C. 190, 203; Bluenose Bus Co. Ltd., Common Carrier Application, 1 M. C. C. 173, 176; Richard L. Richards, Extension of Operations, 6 M. C. C. 80, 81; Ohio Transportation Co., Common Carrier Application, 29 M. C. C. 513, 520; Royal Cadillac Service, Inc., Common Carrier Application, 43 M. C. C. 247, 259. The courts, too, have recognized inadequacy of existing facilities as a basic ingredient in the determination of public 'necessity'. Inland Motor Freight *v.* United States, D. C. E. D. Wash. 60 F. Supp. 520, 524. See also Interstate Commerce Commission *v.* Parker, 326 U. S. 60, 69, 70, 74, 65 S. Ct. 1490, 89 L. Ed. 2051 and dissenting opinion of Mr. Justice Douglas. This does not mean that the holder of a certificate is entitled to immunity from competition under any and all circumstances. Chesapeake & O. R. Co. *v.* United States, 283 U. S. 35, 51 S. Ct. 337, 75 L. Ed. 824. The introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service. Interstate Commerce Commission *v.* Parker, *supra*. No such finding has here

been made, nor is there any evidence to support such a finding" (82 F. Supp. at 157).*

Cf. *Interstate Common Carrier Council of Maryland, Inc.* v. *United States*, 84 F. Supp. 414, 421 (D. Md. 1949) *aff'd* 338 U. S. 843.**

The decisions of this Court cited by petitioners are not to the contrary. Indeed, Mackay Radio concedes that in all these decisions the existing services were to be improved by the authorizations involved (Mackay Radio's brief, p. 22).

Chesapeake & Ohio Ry. v. *United States*, 283 U. S. 35, involved the construction of a railroad line which was not an intrusion into territory already being well served by another carrier but was necessary to continue the existing competitive situation (283 U. S. at 41).*** In *Interstate*

---

* In addition to those Interstate Commerce Commission decisions cited by Circuit Judge Swan, the following have denied carrier applications in the absence of a showing of public need or public benefit from the proposed service.

Norton Common Carrier Application, 1 M. C. C. 114 (1936); *C & D Oil Co., Contract Carrier Application*, 1 M. C. C. 329 (1936); *Carr, Contract Carrier Application*, 2 M. C. C. 263, 269 (1937); *Irven G. Saar, Common Carrier Application*, 2 M. C. C. 729 (1937); *Merrill & Hamel, Common Carrier Application*, 8 M. C. C. 115, 117 (1938); *see, Boyles and Luten, Common Carrier Application*, 8 M. C. C. 593, 594 (1938); *White Circle Line, Common Carrier Application*, 16 M. C. C. 516, 520 (1939).

See Mr. Justice Douglas dissenting in *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 74 n. 1.

** ". . . we know of no authority for the proposition that where there is no . . . affirmative evidence of public convenience and necessity [by the testimony of shippers or otherwise], mere operating convenience . . . is sufficient of itself for a finding of public convenience and necessity. . . ." (84 F. Supp. at 421)

*** Moreover, as the District Court there found, the line was necessary to develop coal-bearing lands which it would tap, to obtain the expected economies from the unchallenged construction of a line by a third carrier, to cause the development of lands tributary to the latter line but owned by the applicant, to aid in the development of the third carrier, and finally to provide a connecting service needed by the public, 35 F. 2d 769, 775-777 (S. D. W. Va. 1929).

Commerce Commission v. *Parker*, 326 U. S. 60, there was no dispute as to the need for the new and different service and the resultant advantages to shippers (326 U. S. at 65, 69-70, 72). As was said in *American Trucking Associations, Inc.* v. *United States*, 326 U. S. 77 at 86, the issue was between the advantages of "improved" rail service and the injury to existing motor carriers. Again, in *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, it had been found that the existing service was inadequate and that the peculiar situation required either granting or denying both the applications to provide the new service (327 U. S. at 530-531). *Norfolk Southern Bus Corp.* v. *United States*, 96 F. Supp. 756 (E. D. Va., 1950) *aff'd* 340 U. S. 802, involved the removal of a restriction upon operations to provide an improved service for which there was public demand (96 F. Supp. at 760).

The key factor in all of these cases is that they did not use "competition" as a shibboleth—the factor of competition was but one of all of the factors considered in determining what would serve the "public interest, convenience, or necessity" in a common carrier industry. Here, however, the Commission majority made "competition" an end in itself in the face of its own basic findings of specific injuries to the public. For reasoned judgment based upon findings of fact in the context of a regulated industry, the Commission majority substituted a slogan—the "reasonably feasible".

Enforcement by the Commission of the Congressional Standard

The Commission in its regulation of common carrier activities under the Communications Act heretofore universally recognized and applied the specific criteria of the statutory licensing standard.

It has always been a prerequisite for the authorization of a radio circuit that there be an affirmative showing by the applicant that the public would enjoy ascertainable benefits from the proposed operations.* In the absence of such a showing applications have been repeatedly denied.

The specific criteria of the public interest standard were recognized and first applied by the Commission in *Mackay Radio & Telegraph Co. Inc.*, 2 F. C. C. 592 (1936) (The "Oslo Case") where the Commission denied Mackay's application for a duplicative radio circuit with Norway then served by another radio circuit. (The denial was affirmed by the Court below, 68 App. D. C. 336, 97 F. 2d 641 (1938).) The Commission's reasons for denying the application were:

> "• • • there are adequate radio and cable facilities, keen competition, and service with which there is no complaint. The proposed new circuit would not offer new or improved service, reduce rates, or create traffic. It would decrease the revenues of all established competing companies except applicant. The establishment of the proposed circuit would mean the practical withdrawal of an associated cable company from competition. The expected increase in revenue to applicant is not shown to be necessary for the continued operation of applicant or of the International System as competing factors in international communication service. The total revenue to the American-owned companies, upon which this country must depend for its independent foreign

---

* The criteria of the statutory standard were recognized and designated by the Commission in its order initiating the hearing on Mackay's applications in this case (R. 22-25).

The Commission in the instant case stated that the burden of proof rests with Mackay Radio: "In arriving at a decision on any application before us, we must determine whether the applicant has demonstrated that a grant of such application will serve the public interest, convenience or necessity" (R. 628). This view has been codified in amended Section 309, 66 Stat. 715 (1952), 47 U. S. C. A. § 309 (1952 Supp.).

> communications system, would be reduced and additional expense incurred without any corresponding benefit to the American people by reduced rates or improved service." (2 F. C. C. at 600).

In the instant case the Commission recognized that the issue here "is very similar, if not the same" as that involved in the *Oslo* case (R. 618).

In *Mackay Radio & Telegraph Company, Inc.*, 8 F. C. C. 11 (1940) Mackay Radio again pressed the claim that it should be granted a circuit in order to permit it to duplicate an existing circuit between the United States and Italy. The Commission in denying the application applied the same criteria of the public interest standard, stating:

> "* * * existing cable and radiotelegraph facilities between the United States and Italy are adequate to handle the existing traffic and any increase in the traffic between the two countries that can reasonably be anticipated. The applicant does not propose to lower the existing rates or to offer new classes of service, but proposes to render a service similar to that now available to the public over existing routes. * * * It does not appear that the proposed service of the applicant would be superior to the service of the existing carriers, or that the effect of the proposed operation would be to improve the existing service. Nor does it appear that the needs of the national defense would be better met by the addition of the proposed circuit. The record does not provide any sound basis upon which it may be determined that any substantial increase in the traffic between the United States and Italy will occur through the proposed operation or that the added facilities will create new traffic. The traffic and revenue secured by the applicant would for the most part come through diversion from and at the expense of the carriers now in the field. There is

at the present time keen competition for the Italian traffic between American carriers. The traffic and revenue available do not justify intensifying the existing competitive situation or the resulting reallocation in view of the other facts of this case" (8 F. C. C. at 24).*

Three years later the Commission once again denied applications for duplicative operations. *Postal Telegraph-Cable Company*, 9 F. C. C. 271 (1943). In doing so, the Commission stated:

> "The installation and maintenance of additional telegraph equipment at points where the existing plant is more than sufficient to handle available traffic is not deemed conducive to the development of a sound and economically established system. • • •
>
> "It is recognized that the denial of these applications may prevent Postal from competing effectively with Western Union at the points in question; but determinations under the standard of public convenience and necessity must proceed upon consideration of advantages and disadvantages that will result to the public and the communication system serving it, rather than to the individual carrier involved. It does not appear that any advantage to the public will result from the granting of these applications, other than the rather indefinite satisfaction of having two telegraph carriers to choose between, rather than being limited to the service of the present carrier operating in the respective communities. Since in these cases the service of the existing carrier appears to be satisfactory, this slight advantage, if any, does not outweigh the additional burden which would be placed on the tele-

* The traffic and revenue available then in the case of Italy is greatly in excess of that presently available in the case of Portugal. Compare 8 F. C. C. at 18 with R. 584:

Italy in 1936—8,131,770 words, revenue of $444,811.
Portugal in 1947—5,422,221 words, revenue of $172,321.

graph industry as a whole by the granting of these applications." (9 F. C. C. at 276-277).

Among the many other cases in which the Commission recognized and applied the specific criteria of the public interest standard and denied applications for needless common carrier operations are:

Press Wireless, Inc., 6 F. C. C. 480 (1938) (Application denied on failure to show a public need—existing facilities adequate and no improved service offered);

Mackay Radio & Telegraph Company, Inc., 6 F. C. C. 562 (1938) (Commission rejected the contention that furtherance of competition should override the other factors to be considered in applying the statutory standard, citing the *Oslo* case);

Press Wireless, Inc., 11 F. C. C. 250 (1946) (Application denied for failure to show a public requirement —existing facilities were adequate and rates would not be lower than those charged by other carriers);

Press Wireless, Inc., 12 F. C. C. 465 (1947) (Application denied on failure to show a substantial public demand or need—existing facilities were adequate, service would require use of urgently needed frequency space and doubt existed as to whether rates would be lower than those charged by other carriers);

Mackay Radio and Telegraph Company, Inc., 12 F. C. C. 478 (1947) (Applications denied as a needless uneconomic expansion of public service facilities, since they may result in an economic burden on the public, citing the *Oslo* case);

Press Wireless, Inc., F. C. C. Docket No. 7822 (May 4, 1949) (Applications denied on failure to show a public need—existing facilities adequate).

Congress Has Declined to Change the Statutory Standard Although It Was Specifically Urged to Do So

Mackay Radio did not appeal to this Court from the Oslo decision but rather appealed to Congress, urging it to change the public interest standard as repeatedly interpreted by the Commission and by this Court. In 1938 bills were introduced at the instance of Mackay Radio providing that in passing upon applications for direct radio circuits the Commission "shall consider competition in such communication to be in the public interest" S. 3875 and H. R. 10348, 75th Cong. 3d Sess. (1938). These bills were not enacted.

The Commission's New Standard

The Commission majority for the first time in its history has assumed authority to license duplicative radio circuits upon findings that—

(a) the capacity of existing facilities is in excess of that required by present and expected traffic (R. 604);

(b) active and substantial over-all competition exists for traffic with the points in issue (R. 606, 612);

(c) the proposed duplicative circuits

—will not satisfy a public need or result in lower rates or speedier service or will not otherwise be superior to or more comprehensive than the service now available (R. 605);

—will reduce total revenue of the United States communication system (R. 578 n. 1, 591);

—will not generate new traffic but will divert traffic from existing carriers without reduction of their expense (R. 606, 607);

—will have an impact (increase) on the rate structure (R. 607);

—will create the danger of foreign monopolies "playing-off" one United States carrier against the other to the detriment of the United States communications system (R. 622);

—will degrade existing service (R. 589);

—will require additional scarce radio frequencies and will use other scarce frequencies (R. 575-576, 586).

It is first clear from these findings that there is no public need for additional communications facilities (R. 604). *RCAC presently uses only 10% of its capacity to and from The Netherlands and only 22% of its capacity to and from Portugal* (R. 131-132, 516-517, 604)*. Despite this finding of excess capacity, the Commission majority granted the authorizations in issue.

It did so under a guiding policy admittedly enunciated for the first time in this case. Under this new policy the Commission has substituted for the Congressional standard a standard of its own creation which it labels the "reasonably feasible".

The Commission majority was "of the opinion that a second, duplicative radio circuit should be authorized"

---

* Mackay Radio faced with the Commission's finding of excess capacity argues that this should not prevent a further increase in this capacity. This argument ignores the economic facts. RCAC's equipment (four channel multiplex) was installed in order to make available up to date developments in facilities and techniques (R. 114, 119). Furthermore, the additional cost of providing four rather than two channel equipment was only $200 (R. 372, 373).

where the applicant demonstrates that such competition is "reasonably feasible" (R. 628). This is to be the "guiding policy" for Commission action in the future.*

Under the Commission's new standard, cumulative competition in and of itself is substituted for findings of specific benefits resulting from the proposed operation. The findings required by the public interest standard are to be replaced by "speculation devoid of factual premise."**

The Commission majority made no findings as to any "long range" benefits which might be expected from the addition of competition to an already actively competitive situation (R. 606). A speculative argument to this effect was made by its counsel in the court below (R. 701). The court below pointed out that such speculation "is not a finding that the specific competition here in issue will produce better service or lower rates or any other public benefit" (R. 701).

Its speculation is contradicted by its finding that:

> "It does not appear that Mackay's proposed service to each of the points at issue will result in lower rates or speedier service, or will otherwise be superior to or more comprehensive than the service now available via RCAC."

Congress in providing for the regulation and licensing of common carriers refused to so speculate. It recognized that the nature of this industry is essentially different from the unregulated aspects of the economy to which the anti-

---

* Seventeenth Annual Report, Federal Communications Commission 4 (1951).

** *American Airlines, Inc. v. Civil Aeronautics Board*, 192 F. 2d 417, 421 (1951).

trust laws are unqualifiedly applicable. A purpose of the antitrust laws, obviously inapplicable to this industry, is—

> ". . . to perpetuate and preserve, for its own sake and despite its possible cost an organization of industry in small units, which can effectively compete with each other."*

The Commission and Mackay Radio in attempting to justify this unwarranted speculation in effect argue that duplicative operations should be authorized in the name of competition where they can do no harm. Such an argument, if it may ever justify regulatory action, is not applicable to this case. As the Commission has found, the duplicative radio circuits here involved will produce specific injuries to the public interest.

Precious radio frequencies which could be used to advantage elsewhere will be employed in an unneeded duplicative operation. Additional frequencies will be required.

The foreign radio monopolies will be afforded the opportunity to play-off United States carriers one against the other and further weaken the industry.

The precarious economic condition of the United States international telegraph industry in recent years has already required four rate increases totalling over $13,000,000 on an annual basis.** A true perspective is had when it is realized that the existing cable and radio carriers compete

---

* *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429 (2d Cir. 1945). See also *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 323; *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 536.

** Reports and Orders of the Commission in *Charges for Communications Service*, 12 F. C. C. 29, 64 (1947); 12 F. C. C. 926, 931 (1948), and unreported Decision and Order in the same docket, adopted January 26, 1949; R. 650.

for a total of 420 and 1089 messages per calendar day to Portugal and The Netherlands, respectively.*

The existing carriers will be required to subsidize their Netherlands and Portuguese operations by their operations elsewhere. Even so, their operations will be on a marginal basis with no room for development of improved services or facilities.

For example, based on the theory of the Commission majority as to the allocation of expenses among circuits, RCAC estimates that its net operating revenue from its Portuguese circuit will be reduced to $1,040 (R. 594). This figure is before taxes. Applying the corporate tax rate of 52%, net operating revenue after taxes will be reduced to $499.20 annually. This result of the application of the Commission's new standard of the "reasonably feasible" is an illustration of the pernicious anemia that is to be introduced into this industry.

The "reasonably feasible" is to mean bare subsistence.

Such a result is contrary to the recognition by this Court of the public interest in safeguarding existing carriers. In *Texas & Pacific Ry.* v. *Gulf C. & S. F. Ry.*, 270 U. S. 266, this Court stated with respect to the public interest standard:

> By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to

* Exh. 68 (Tr. 862, appears at Tr. 3458-3459).

the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss" (270 U. S. at 277).

The Commission majority made no findings that comply with the standard laid down by this Court in the above quotation. On the contrary, its specific findings show that it did not intend to require compliance with this standard. The vague, question begging words "reasonably feasible" do not negative the effect of the specific findings of actual injury.

Under the Congressional standard and upon the Commission's own basic findings of injury rather than benefit to the public, the only conclusion which could properly be reached was the opposite of that of the Commission's majority. As a matter of law, an administrative determination divorced from the guides laid down by statute and contradicted by basic findings cannot stand. The court below rightly reversed.

II.

The Commission's Decision Sanctioned Substantial Lessening and Restraints of Competition Between Cable and Radio in Violation of Section 314

Section 314 Requires the Preservation of Competition Between Cable and Radio

Section 314 of the Communications Act expressly prohibits control of cable operations by radio and control of radio operations by cable "if . . . the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in . . . the United States . . . and any place in any foreign

country, or unlawfully to create monopoly in any line of commerce . . .'"*

Its special purpose was stated by the court below in *Mackay Radio & Telegraph Co., Inc.* v. *Federal Communications Commission*, 68 App. D. C. 336, 340, 97 F.2d 641, 645 (1938) (the "*Oslo* case"):

> "Section 314 . . . is devoted wholly to an effort to maintain competition between radio circuits on the one hand and telegraph and cable lines on the other."**

This purpose the majority of the court below reiterated in this case (R. 702).

In so doing, they made clear that the relevant context under Section 314 is competition between cable and radio. They rejected the contention (R. 707) that a substantial lessening of competition between cable and radio in violation of Section 314 is justified by purported enhancement of competition between radio carriers.

Section 314 is a re-enactment of Section 17 of the Radio Act of 1927. (H. R. Rep. No. 1918, 73rd Cong. 2d Sess. 47 (1934).) When that bill was debated on the floor of the House, Representative White stated with respect to Section 17, the predecessor of Section 314:

---

* This prohibition is in addition to Section 313 which makes the private practices of carriers subject to the antitrust laws and to Section 602(d) which charges the Commission with the enforcement of the provisions of the Clayton Act.

** In that case, the Commission had denied, 2 F. C. C. 592, 596, 600 (1936), Mackay's application for a circuit to Norway. It found that Mackay Radio's contract with the Norwegian administration provided for the diversion of all unrouted traffic from Commercial Cable to Mackay Radio and that:

> "The establishment of the proposed circuit would mean the practical withdrawal of an associated cable company from competition" (2 F. C. C. at 600).

> "We hope by this provision to preserve competitive conditions between cable and radio in transoceanic communication." 67 Cong. Rec. 5480 (1926).

Representative White later repeated this statement. 68 Cong. Rec. 2579 (1927).

This national policy in the field of international common carrier communications has recently been reiterated by the President's Communications Policy Board, which stated:

> "The fact that both cable and radio facilities are required by the United States for its overseas telecommunications system shall guide consideration of any material matters which affect the availability, in the form of continued operation, of either medium." *Telecommunications, A Program for Progress* 223 (1951).

Formerly, the Commission itself recognized that it is desirable from the standpoint of the public convenience, as well as the national defense, in view of the peculiar advantages of each, to maintain both cable and radio. *R.C.A. Communications, Inc.*, 8 F. C. C. 58, 72-73 (1940); *Mackay Radio & Telegraph Co., Inc.*, 8 F. C. C. 11, 16 (1940).

Congressional awareness of the dangers inherent in the control of one type of carrier by another is not confined to international communications. Provisions similar to that of Section 314 have been made part of the statutes regulating rail, motor, water and air carriers.* The preservation of competition between different types of carriers has been deemed necessary to the maintenance of the inherent advantages of each. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 84.

---

* 49 Stat. 555 (1935), 54 Stat. 905 (1940), 49 U. S. C. §5(2)(b) (1946); 37 Stat. 566 (1912), 41 Stat. 482 (1920), 54 Stat. 909 (1940), 49 U. S. C. §5(14)-(16) (1946); 52 Stat. 1001 (1938), 49 U. S. C. §488 (1946).

To preserve cable and radio as two separate media of communication and to protect them against the dangers of control of one by the other, *e.g.*, ". . . the non-use of a competing cable company in the telegraph field" Congress prohibited such control where a substantial lessening or restraint of competition between the media is intended or may result (R. 577).

Section 314 Applies to Mackay Radio and Commercial Cable

The Commission found that Section 314 is applicable to Mackay Radio, Commercial Cable and the AC&R system of which they are a part "just as it would be to any commonly owned cable and radio system" (R. 610).

In so finding, the Commission adopted its findings and conclusion in Docket 9093 (R. 608-609). There the Commission exhaustively considered the legislative history of Section 314 and the actions taken by the Commission and its predecessor, the Federal Radio Commission with respect to the AC&R companies (Pars. 80-110).

The Commission there rejected the contention of the AC&R companies that their integration *per se* exempted them from the effect of Section 314—a contention which Mackay Radio continues to urge in its brief to this Court (p. 39). In refusing to accept this plea of guilt as an excuse, the Commission pointed out that the integration of Mackay Radio and Commercial Cable had largely been effectuated in 1946 and that the AC&R companies had prior thereto represented themselves as competitors (*supra*, pp. 22-23). The Commission found:

> "[the AC&R companies'] operations are at present considerably different from what they were when Section 314 was passed, in that certain elements of competitive activity which previously obtained,

particularly with respect to traffic handling, routing, and solicitation are no longer followed" (Par. 109).

The Commission here found that the increasing effort toward the integration of Mackay Radio and Commercial Cable had taken place during the past few years (R. 566).

The issue here is not the legality of a static situation of control of a cable carrier by a radio carrier existing prior to the passage of an act forbidding such control. The issue is whether a program, initiated since the enactment of Section 314, for the integration of previously competitive cable and radio carriers may validly culminate in deliberate diversions of substantial traffic from Commercial Cable to Mackay Radio.

Common Ownership of Mackay Radio and Commercial Cable Does Not Insulate Them Against Section 314

The common ownership and control of Commercial Cable and Mackay Radio by AC&R is the means by which the recent program of integration of the two companies has been effectuated and by which the diversions of substantial traffic to The Netherlands and Portugal from Commercial Cable to Mackay Radio will be caused.

The dissenting judge below, however, transformed this device for the restriction of competition into insulation against the prohibition of Section 314 (R. 705-707). He made the erroneous factual and legal assumptions that "complete common ownership removes subsidiaries from competition with each other" (R. 705).

Factually, his argument is contradicted by the history of the AC&R companies. The impairment of competition between Commercial Cable and Mackay Radio for traffic and in the rendition of service occurred after the passage

of the Communications Act of 1934 and largely in and since 1946, despite common ownership of the two companies since the late 1920's.

Moreover, the argument of the dissenting judge below is a complete reversal of the meaning of Section 314. It would effectively read out of the statute the prohibitions against restrictions upon competition between cable and radio so long as the device employed is common ownership.

In applying the Sherman Act, which contains no such express provisions directed at restrictions upon competition caused by common ownership, this Court has held that common ownership or control does not liberate corporations from the impact of the antitrust laws.

Timken Roller Bearing Co. v. *United States*, 341 U. S. 593, 597-598;
Kiefer-Stewart Co. v. *Seagram & Sons, Inc.*, 340 U. S. 211, 215;
United States v. *Yellow Cab Co.*, 332 U. S. 218.

Competition Between Cable and Radio Will Be Substantially Lessened Under the Commission's Decision

Section 314 prohibits the control of cable operations by radio if the purpose is and/or the effect "may be" substantially to lessen competition between the two media between any place in the United States and any place in any foreign country.

Interpretation of similar language in the Clayton Act has made it clear that forbidden restraints upon competition are to be reached in their incipiency. *Standard Fashion Co.* v. *Magrane Houston Co.*, 258 U. S. 346. The test is whether competition will be foreclosed in a substantial share of the line of commerce affected.

Standard Oil Co. of California v. *United States*, 337 U. S. 293;
International Salt Co., Inc. v. *United States*, 332 U. S. 392.

The term "substantial share" has been given content by these decisions. The *Standard Oil* case involved restrictions upon the sale of 6.7% of the total taxable gallonage and 2% of the tires and batteries sold in the competitive area. The *International Salt* case held that annual sales of salt to industrial users throughout the country of the value of $500,000 were not "insignificant or unsubstantial."

When these criteria are applied to the admitted lessening of cable competition culminating in the deliberate diversions of traffic from Commercial Cable to Mackay Radio, it is clear that all the tests of substantiality are satisfied.

In 1947 Commercial Cable carried 30.9% of the cable traffic to The Netherlands and 15.2% of the cable traffic to Portugal (R. 612).

The Commission estimated that 50% of Commercial Cable's traffic to The Netherlands and 25% of its traffic to Portugal would be immediately diverted under the authorizations in issue (R. 613-614).

The Commission's estimates of these diversions were based upon the amount of unrouted traffic which Commercial Cable presently carried. Under Mackay Radio's contractual arrangements with the foreign monopolies, however, it is to the interest of the AC&R system to make these diversions total since Mackay Radio will thereby proportionately increase the non-competitive allocations of inbound traffic to it (R. 573, 591). In a similar situation the joint solicitation staff of the AC&R system admittedly urged customers to route their messages via Mackay

Radio rather than via Commercial Cable (R. 643-644, 268-269).

The economic incentive under Mackay Radio's contractual arrangements is to increase the diversions to the point of strangulating its cable twin.

The Commission found:

> "There is no doubt that if Mackay's application herein were to be granted a substantial portion of the traffic now handled by Commercial to Portugal and The Netherlands . . . would be diverted to Mackay (R. 609-610).
>
> . . . . . .
>
> "There is no doubt that to the extent that a grant of Mackay's applications would result in the deliberate diversion of traffic from the AC&R cable companies it would reduce competition between cable and radio to the points at issue" (R. 615).

Yet, the Commission majority went on to reach the startling conclusion that there would not be "such substantial reduction of competition between cable and radio" as to violate Section 314 since "there will be substantial cable versus radio traffic . . . even if Mackay's applications are granted" (R. 615).

Such reasoning is irrelevant to the issue of whether a prohibited lessening of competition between cable and radio will result. Section 314 does not await arrival at the goal of the artificial elimination of cable before condemning the direction of the movement. *International Salt Co., Inc.* v. *United States*, 332 U. S. 392, 396.

As has been said with respect to a similar section of the Clayton Act, prohibitions such as that of Section 314 are intended to prevent:

> ". . . a significant reduction in the vigor of competition, even though this effect may not be so

> far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise [from the] elimination in whole or material part of the competitive activity which has been a substantial factor in competition . . . ." H. R. Rep. No. 1191, 81st Cong. 1st Sess. 8 (1949).

Certainly a material part and very possibly the whole of the competitive activity of Commercial Cable, which has been a substantial factor in the competition offered by cable to radio for traffic to The Netherlands and Portugal, will be eliminated under the authorizations in issue. As a consequence, there will be a significant and forbidden reduction in competition between cable and radio. If the AC&R scheme works in totality, there will be a *de facto* abandonment of Commercial Cable.

Competition Between Cable and Radio Will be Illegally Restrained Under the Commission's Decision

Section 314 forbids control of cable operations by radio if the effect may be, or the intent is, to restrain commerce between any place in the United States and any place in any foreign country.

The operations of Mackay Radio and of the AC&R system under the authorizations in issue will unlawfully restrain commerce.

(1) Commercial Cable admittedly will be restrained from freely competing for traffic to The Netherlands and Portugal. Traffic obtained by the recently consolidated soliciting staffs of Mackay Radio and Commercial Cable (R. 262) will be divided upon an arbitrary non-competitive basis dictated by the contracts between Mackay Radio and its foreign correspondents (R. 573, 591).

Thus, allocation of trade territories and an arrangement for the pooling of traffic and revenues, both illegal *per se*, are contemplated.

> *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (allocation of trade territories between affiliated companies held an illegal restraint);
>
> *United States* v. *National Lead Co.*, 63 F. Supp. 513 (S. D. N. Y. 1945), *aff'd* 332 U. S. 319 (agreement to divide markets condemned as an unlawful restraint);
>
> *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co., Inc.*, 159 F. 2d 306 (4th Cir. 1947) *cert. denied*, 331 U. S. 827 (arrangement for the pooling of traffic and revenues held to violate the Sherman Act).

(2) To comply with the guarantee contained in the contract between Mackay Radio and The Netherlands Administration, it may be necessary to transmit messages via Mackay Radio although the sender has chosen to route the message via Commercial Cable (R. 573).

This suppression of the consumer's choice between alternative, equally important and previously competitive communications media is forbidden.

> *Lorain Journal Co.* v. *United States*, 342 U. S. 143 (the attempt by a newspaper to eliminate the competition of a radio station was condemned); see also *Mansfield Journal Co.* v. *Federal Communications Commission*, 86 App. D. C. 102, 180 F. 2d 28 (1950).

(3) In operating under the authorizations in issue, neither Mackay Radio nor Commercial Cable will determine independently the rates to be charged for their ser-

vices. It is undisputed that a joint tariff schedule will be proposed (R. 258-259, 272).

Such price-fixing restraints upon carriers' independent initiation of rates are illegal *per se*.

> *Kiefer-Stewart Co.* v. *Seagram & Sons, Inc.*, 340 U. S. 211 (price fixing agreement between affiliated companies held illegal *per se*);
>
> *Georgia* v. *Pennsylvania R.R.*, 324 U. S. 439 (restraint upon carrier's freedom to initiate rates condemned);
>
> *Pennsylvania Water & Power Co.* v. *Consolidated Gas Electric Co.*, 184 F. 2d 552 (4th Cir. 1950), *cert. denied*, 340 U. S. 906 (restraint upon utility's independent initiation of rates held illegal *per se*).

It is the extension of these illegal restrictive practices to new areas of international communications which the Commission sanctioned.

III.

The Commission's Decision Sanctioned the Purchase of Traffic in Illegal Restraint of Competition Between Radio Carriers

Section 313 of the Communications Act makes all laws "relating to unlawful restraints and monopolies and to combinations, contracts or agreements in restraint of trade" applicable to "foreign radio communications . . .".

The Commission majority erroneously assumed that this Section, which subjects carriers to the anti-trust laws, made the competitive policy governing unregulated aspects

of the economy determinative of its licensing decisions (R. 623). It confused the requirement that licensed carriers must obey the antitrust laws with the question of how many carriers it should license.

Mackay Radio has unique power as part of a radio and cable system. Under the authorizations in issue, the leverage of that system will be exercised to foreclose a radio carrier, which has no cable affiliation, from competing for that traffic.

Mackay Radio will not compete as an independent carrier for traffic. Instead it will purchase non-competitive allocations of traffic with traffic diverted from Commercial Cable. The receipt by Mackay Radio of traffic will be tied to the traffic diverted from Commercial Cable.

A *de facto* merger of Mackay Radio and Commercial Cable is to be effectuated which permits the shifting of traffic from one company to the other as required to obtain United States-bound traffic (R. 267, 296). Mackay Radio admitted the substantial advantage this unique ability to shift traffic from one carrier to another gives to the AC&R system (R. 296).

This advantage has been employed in the contracts, under which Mackay Radio will operate the circuits in issue, not as the Commission majority said, to enhance, but in fact to restrain competition.

Under its contracts with the government-controlled monopolies in The Netherlands and Portugal, Mackay Radio will receive non-competitive allocations of United States traffic (R. 573, 591). As the price for this traffic, Mackay Radio has agreed to deliver out-bound traffic diverted from its sister, Commercial Cable, and converted into radio traffic (R. 573, 591).

Not only is the traffic diverted from Commercial Cable the consideration for these non-competitive allocations of

traffic, but it is the measure of the United States-bound traffic which Mackay Radio will receive.

Thus, Mackay Radio will purchase traffic from the foreign administrations—a predatory practice long forbidden to carriers. *United States* v. *Union Stockyard & Transit Co.*, 226 U. S. 286.

It is undisputed that the traffic obtained by Mackay Radio by this non-competitive method will be at the expense of RCAC, a company which operates solely by radio and has no cable affiliation (R. 558, 580 n. 1, 591-592).

These tying agreements abuse the rights granted to Commercial Cable under its cable licenses. They constitute the forbidden use of a government franchise for the operation of a cable line to restrain competition between radio carriers outside the scope of the franchise.

Like abuses of similar government franchises have been invariably condemned.

> *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (abuse of copyright);
> *International Salt Co., Inc.* v. *United States*, 332 U. S. 392 (abuse of patent rights);
> *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (abuse of patent rights);
> *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488 (abuse of patent rights);
> *Timken Roller Bearing Co.* v. *United States*, 431 U. S. 593 (abuse of trademark privileges).

The contracts between Mackay Radio and the foreign administrations are the illegal product of the unique power of the AC&R hybrid. The shifting of traffic from Commercial Cable is the lever whereby Mackay Radio will obtain allocations of traffic and will foreclose RCAC from competing for that traffic.

Predatory exercise of leverage, such as that of the AC&R system, is forbidden.

> *United States* v. *Griffith*, 334 U. S. 100 (use of power arising from ownership of the only theater in certain towns to obtain advantages elsewhere where competition did exist held illegal);
>
> *United States* v. *General Motors Corp.*, 121 F. 2d 376 (7th Cir. 1941) *cert. denied*, 314 U. S. 618 (automobile manufacturer's coercion of dealers into using the manufacturer's financing subsidiary held illegal restraint).

What the Commission majority's decision makes "reasonably feasible" is not competition, but a classic conspiracy in restraint of trade.

Conclusion

It is submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

JOHN T. CAHILL,
Attorney for Respondent,
63 Wall Street,
New York 5, N. Y.

LAWRENCE J. MCKAY,
HOWARD R. HAWKINS,
WILLIAM E. HEGARTY,
Of Counsel.

April 22, 1953.

APPENDIX A

Communications Act of 1934, 48 Stat. 1064 (1934), as Amended, 47 U. S. C. §151, et seq. (1946).

SECTION 1. "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which sha.. execute and enforce the provisions of this chapter."

SECTION 309(a). "If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding * * *"*

SECTION 313. "All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of

---

* Section 309 was amended subsequent to the issuance of the Commission's decision herein to codify, among other things, that the burden of proof is on the applicant. 66 Stat. 715 (1952), 47 U. S. C. A. §309 (1952 Supp.).

and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications * * *"

SECTION 314. "After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications or signals by radio * * * shall * * * directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, * * * if * * * the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; * * *"*

SECTION 602(d). The first paragraph of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, is amended to read as follows:

> "SEC. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: * * * in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; * * * to be exercised as follows:"

---

* Section 314 also contains prohibitions against the control of radio operations by cable phrased in language substantially identical to that quoted.